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and IRWIN HOME EQUITY CORPORATION

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO DIVISION**

IRWIN UNION BANK AND TRUST
COMPANY AND IRWIN HOME EQUITY
CORPORATION,

Plaintiffs,

v.

FREEDOM MORTGAGE COMPANY,

Defendants.

CASE NO.: C08-00472-PJH

Action filed: January 22, 2008

**PLAINTIFFS' RESPONSE RE:
DEFENDANT FREEDOM
MORTGAGE CORPORATIONS
MOTION TO DISMISS OR STAY
ACTION AND FOR AN ORDER
COMPELLING ARBITRATION**

Date: April 30, 2008

Time: 9:00 a.m.

Courtroom: 3

Hon. Phyllis J. Hamilton

INTRODUCTION

This case arises out of Defendant Freedom Mortgage Corporation's ("Freedom") breach of its obligation to repurchase numerous mortgage loans under a contract with Plaintiffs Irwin Union Bank and Trust Company ("Irwin Union") and Irwin Home Equity Corporation ("IHE"). When Freedom purchased certain assets from another Irwin entity, Irwin Mortgage Corporation ("IMC"), which is not a party to this action, it assumed that contract and liabilities for loans underwritten by Freedom after the asset purchase. By its motion, Freedom purports to seek a dismissal or stay of this action in order to compel the arbitration of Plaintiffs' claims. However Freedom's papers fail to disclose certain key facts to this Court: that it has already sought to stay the arbitration proceeding it seeks to compel by this motion and that it filed a separate, related case in federal district court in Delaware against two other Irwin entities, IMC and Irwin Financial Corporation ("IFC" or "Irwin Financial"), the direct or ultimate parent corporation of each of IHE, Irwin Union and IMC.

Freedom's Delaware complaint essentially seeks to resolve (in a different forum) the same issues present in this case—specifically, Freedom seeks to litigate the issue of whether it is obligated to repurchase the loans under its contract with IHE and Irwin Union. Most significantly, Freedom's Delaware complaint requests an order that IFC compel the Plaintiffs in this action to abandon their claims against Freedom. *See, e.g.*, Freedom Compl. at 20. (A copy of the complaint filed by Freedom in the Delaware action is attached as Exhibit 1 to the Declaration of Jenny L. Dixon ("Dixon Decl.") filed herewith.)

Plaintiffs believe that Freedom's claims in the Delaware action and this action should be consolidated before one court, and litigated together. Freedom will undoubtedly point to the fact that its claims against IFC and IMC in the Delaware action purportedly arise under a different contract, which makes federal court in Delaware an appropriate venue and does not contain an arbitration provision. Freedom Compl. ¶¶ 13-16. The parties have engaged in informal discussions concerning consolidation, and Plaintiffs, IFC and IMC are amenable to consolidation and willing to have all of the claims go to arbitration if that is Freedom's preferred forum.

1 However, Plaintiffs respectfully submit that it is contrary to judicial economy and common sense
2 to have multiple, overlapping actions in different forums.

3 Accordingly, Plaintiffs respectfully request that if the Court is inclined to refer this case
4 to arbitration, Freedom be directed to bring its claims against any other Irwin entity involving
5 these same facts in the same forum because the Irwin entities are willing to agree to a change of
6 forum. Alternatively, if Freedom is unwilling to bring its claims in arbitration, then Plaintiffs
7 respectfully request that Freedom's motion be denied. Further, in the event that Freedom is
8 unwilling to have these cases consolidated, IFC and IMC intend to file a motion to dismiss, stay
9 or transfer the Delaware action to the Northern District of California on or before April 23, 2008
10 because of this first-filed parallel action. What Freedom should not be permitted to do is defeat
11 this first-filed action and then stay indefinitely the resolution of Plaintiffs' claims as it presently
12 intends to do.

13 **BACKGROUND**

14 **A. The Parties**

15 Plaintiff Irwin Union is a commercial bank based in Indiana, founded more than 130
16 years ago. *See* Compl. ¶ 2. Plaintiff IHE is a consumer mortgage lender. *Id.* ¶ 3. Irwin Union
17 owns IHE and is a wholly owned subsidiary of Irwin Financial Corporation. Freedom's Mem. of
18 Points & Auth. ISO Motion to Dismiss or Stay Action ("Freedom's Mot.") at 3-4. Irwin Union
19 also owns IMC. *See* Compl. ¶ 9.

20 Defendant Freedom is a licensed mortgage banker. *Id.* ¶ 4. Freedom entered into an
21 agreement with Irwin Financial and IMC to acquire IMC's mortgage origination assets.
22 Freedom's Mot. at 4. Irwin Financial was a party to the Asset Purchase Agreement because, as
23 the parent corporation of Irwin Union (which owns IMC), Irwin Financial is the indirect owner
24 of IMC's outstanding stock.

25 **B. The Transactions at Issue**

26 In May 2006, Freedom and IMC signed a letter of intent and Freedom began conducting
27 due diligence on IMC's business. Freedom Compl. ¶ 19. After completing its due diligence,
28 Freedom purchased certain assets, and assumed certain liabilities, from IFC and IMC in

1 accordance with the Asset Purchase Agreement dated as of August 7, 2006. *Id.* ¶¶ 22-23.

2 Among the assets assigned to Freedom under the Asset Purchase Agreement was a previously
3 existing Correspondent Loan Purchase and Sale Agreement (the “Loan Purchase Agreement”)
4 between IHE and Irwin Union, on the one hand, and IMC, on the other hand, pursuant to which
5 mortgage loans were sold to IHE and Irwin Union from time to time. *Compl.* ¶¶ 19-24.

6 The Loan Purchase Agreement required IMC (and subsequently, Freedom) to repurchase
7 loans which were “defective.” *Id.* ¶¶ 16-18. “Defective” loans included, among others, those on
8 which the first payment had not been made. *Id.* In October 2006, after the asset purchase closed,
9 Freedom executed an Addendum to the Loan Purchase Agreement that expanded the definition
10 of “defective” loans to include those on which the first, second and/or third payments had not
11 been made. *Id.* ¶¶ 25-28. Numerous loans that Freedom originated and sold to IHE and Irwin
12 Union after purchasing IMC’s assets and assuming the Loan Purchase Agreement were defective
13 for one or more reasons. *Id.* ¶¶ 29-32. IHE and Irwin Union requested that Freedom repurchase
14 these loans. *Id.* ¶¶ 33-36. Freedom has refused to do so and contends that the 2006 Addendum
15 is void and unenforceable under a variety of theories.

16 **C. This Action and the Related Proceedings**

17 On January 22, 2008, IHE and Irwin Union filed the present action asserting two claims
18 for breach of contract – the Loan Purchase Agreement – and a claim for negligence. After
19 requesting and receiving several extensions of time, Freedom responded to the Complaint on
20 March 13, 2008 by way of this motion to dismiss or stay action and for an order compelling
21 arbitration.

22 In its moving papers, Freedom represented that “[s]imultaneously with this motion,
23 pursuant to the [Loan Purchase Agreement] Freedom is filing a claim with the National
24 Arbitration Forum.” Freedom’s Mot. at 5. What Freedom neglected to mention, however, was
25 that its Initial Claim for Arbitration also contains a request for stay of arbitration. *See* Dixon
26 Decl., Exhibit 2 (Freedom’s Initial Claim for Arbitration dated March 12, 2008) at 12-13.
27 Freedom’s moving papers in this Court also failed to state that the purpose of the stay is so

28 Freedom can obtain a resolution of its “action in the U.S. District Court, District of Delaware
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1 (the “Injunction Action”), against [IHE and Irwin Union’s] parent Irwin Financial, and IMC”
 2 that was filed on March 12, 2008. *See* Dixon Decl., Exhibit 2 at 4.

3 In its arbitration claim, Freedom characterizes its claims in the Delaware action as
 4 “seek[ing] specific performance compelling Irwin Financial to direct . . . IHE and [Irwin Union]
 5 to cease pursuing the claims that are the subject of [this] action.” *Id.* Freedom goes on to
 6 explain that the outcome of the Injunction Action in Delaware should result in the dismissal of
 7 the arbitration proceeding. *Id.*

8 ARGUMENT

9 The Loan Purchase Agreement contains a permissive arbitration provision, which
 10 provides in part that “[u]pon written request by either party . . . any claim, demand or cause of
 11 action, which arises out of or is related to this Agreement . . . *may* be resolved by binding
 12 arbitration in the State of California Compl., Ex. A at 22 (emphasis added). The Loan
 13 Purchase Agreement goes on to provide that the “[a]ny action between the parties relating to or
 14 arising under this Agreement shall be tried in the federal or state courts located in Contra Costa
 15 County, California.” *Id.*

16 A number of courts have held that contract provisions containing permissive language
 17 such as the term “may” can serve as the basis to compel arbitration in light of the presumption in
 18 favor of arbitration of disputes as set forth in the Federal Arbitration Act. *See United States v.*
 19 *Bankers Ins. Co.*, 245 F.3d 315, 320-21 (4th Cir. 2001) (discussing case law interpreting
 20 arbitration provisions using the word “may”); *Erickson v. Aetna Health Plans of California*, 71
 21 Cal. App. 4th 646, 654-55 (1999) (same). Here, the arbitration provision is not as unequivocal as
 22 Freedom contends. Plaintiffs believe that the clear language and intent of the Loan Purchase
 23 Agreement, which mandates that “[a]ny action between the parties relating to or arising under
 24 this Agreement” be tried in this Court or the Contra Costa County Superior Court, demonstrates
 25 that the parties’ intent was to have the option to arbitrate *or* seek resolution before the specified
 26 courts. This calls into doubt Freedom’s contention with respect to the arbitration provision that
 27 Freedom had no role in negotiating—it just assumed the contract as part of its acquisition of
 28 IMC’s assets.

1 However, Plaintiffs respectfully submit that here there is a competing, and greater, policy
2 issue at stake than that contained in the Federal Arbitration Act: the notion of judicial economy.
3 Numerous courts have repeatedly recognized that importance of judicial economy and the
4 problems that may arise when cases containing common facts and parties are litigated in
5 different forums. *See Pacesetter Systems, Inc. v. Medtronic, Inc.*, 678 F.2d 93, 94-95 (9th Cir.
6 1982); *Alltrade, Inc. v. Uniweld Products, Inc.*, 946 F.2d 622, 625 (9th Cir. 1991). For this
7 reason, courts routinely transfer, stay or dismiss cases brought in multiple forums so that all the
8 cases can be litigated together, before a single judge in a single forum. *See Alltrade*, 946 F.2d at
9 622 (affirming district court's finding that the first-to-file rule applied and staying this action to
10 allow first-filed action to proceed even when that action involved additional claims and parties).
11 Courts also give deference to the plaintiff's choice of forum in a first-filed action absent special
12 circumstances. *See Centocor, Inc. v. MedImmune, Inc.*, No. C 02-03252 CRB, 2002 WL
13 31465299, at *3-*4 (N.D. Cal. Oct. 22, 2002) (rejecting plaintiffs' argument that the first-to-file
14 doctrine does not apply because the second action named additional parties in the first filed
15 action and they would be prejudiced by adjudication of that action: "[P]laintiffs' argument
16 ignores the fact that courts generally do not require identical issues or parties so long as the
17 actions involve closely related questions or common subject matter."); *Time Warner Cable, Inc.*
18 *v. GPNE Corp.*, 497 F. Supp. 2d 584 (D. Del. 2007) (granting defendant's motion to dismiss case
19 in favor of a first-filed action in Texas). Freedom may contend that the arbitration provision at
20 issue in this action should take precedent over the first-filed doctrine. This contention is
21 undermined, however, by Freedom's attempt to stay the arbitration it seeks to compel and to
22 instead proceed with litigating substantially the same issues against related parties in a different
23 forum.

1 Plaintiffs believe that the importance of judicial economy and the benefits of having all of
2 the issues litigated in a single forum are equally present in this case.¹ Plaintiffs originally filed
3 their complaint in this Court and with these parties because Plaintiffs believed that these were the
4 essential parties to this dispute, and that the forum selection clause for the contract at issue here
5 provided that this case was to be brought in this Court. Plaintiffs continue to believe that this is
6 still the right forum for this dispute, and that these parties are sufficient. Indeed, the substance of
7 Freedom's claims in the Delaware action—that the 2006 Addendum is void—could have been
8 (and should have been) asserted as cross-claims and litigated in this action. However, to the
9 extent that Freedom believes other Irwin entities should be added, those entities would have been
10 (and are) willing to consent to Freedom adding them by way of counter-claim, so that all of the
11 issues could be heard in this Court.

12 Instead, Freedom chose to try to get this case moved to arbitration and stayed, and chose
13 to file a similar action in Delaware. Freedom's forum-shopping should not be rewarded or
14 countenanced. If Freedom wants to have all of the issues in dispute arbitrated, that is acceptable
15 to Plaintiffs in this case (as well as IFC and IMC). Alternatively, if Freedom believes that the
16 case should proceed in federal court, then Plaintiffs respectfully request that Freedom's motion
17 to stay or transfer this action be denied, and that Freedom bring the claims in its Delaware case
18 as counterclaims in this case (as noted above, IFC and IMC intend to make a similar motion in
19 the Delaware action on or before April 24, 2008). What should not occur, however, is for this
20 case to be transferred to arbitration and then have that arbitration stayed or moving forward at the
21 same time as the Delaware action filed by Freedom, with the potential for conflicting results and
22 the unnecessary burdens incurred as a result of litigating overlapping (and indeed some identical)
23 issues in multiple forums.

24
25
26 ¹ Plaintiffs, Irwin Financial and IMC believe that Freedom's claims in the Delaware action
27 are without merit. Nonetheless, resolution of these claims in the same forum as Plaintiffs' will
28 be most efficient and conserve judicial resources.

1 **CONCLUSION**

2 For the foregoing reasons, Plaintiffs respectfully request that the Court either defer ruling
3 on this motion until the Delaware court has addressed the motion to transfer that action to the
4 Northern District of California or take other such action to ensure that the parties and courts do
5 not have to face multiple actions in different forums over the issues raised in this case.

6
7 Dated: April 9, 2008

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation
David J. Berger (Bar No. 147645)
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10 By: /s/
11 David J. Berger

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17 I, Jenny L. Dixon, am the ECF User whose identification and password are being used to
18 file this PLAINTIFFS' RESPONSE RE: DEFENDANT FREEDOM MORTGAGE
19 CORPORATIONS MOTION TO DISMISS OR STAY ACTION AND FOR AN ORDER
20 COMPELLING ARBITRATION. In compliance with General Order 45.X.B, I hereby attest that
21 David J. Berger has concurred in this filing.

22 Dated April 9, 2008

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

23 By: Jenny L. Dixon
24 Jenny L. Dixon

25 *Attorneys for Plaintiffs Irwin Union Bank and*
26 *Trust Company and Irwin Home Equity*
27 *Corporation*